CALCUTTA HIGH COURT

Japan Cotton Trading Company Ld

Vs

Jajodia Cotton Mills Ld

(Rankin,C.J.)

24.11.1926

JUDGMENT

Rankin, C.J.

1. This is an appeal by the Japan Cotton Trading Company, Limited, which presented a petition before Mr. Justice C.C. Ghose for the compulsory winding up of a company called the Jajodia Cotton Mills, Limited. Several points were dealt with by the judgment, but there is a point not dealt with by the judgment, as to which we are not satisfied, that it ever was abandoned and which we think is fatal to the petition.

2. It appears that a firm called Sukdeodas Ramprosad were the managing agents of the company. They were also Banians and apparently debtors of the petitioning creditors. They obtained a promissory note for Rs. 6,00,000 from the company payable on the 31st of March 1926 and they endorsed that promissory note to the petitioning creditors. It is as endorsees of that promissory note that the Japan Cotton Trading Company, Limited, claim to be entitled to wind up the Cotton Mills, Limited.

3. The first question in such a case, logically no doubt, is the question whether there is a good petitioning creditor's debt, and two points as to that are contested at the present stage of this case. The first point of contest is that it is said that upon a true construction of the promissory note it is not a note binding the Jajodia Cotton Mills, Limited, at all, but is really a note on which the directors, D.H. Wilmer, Radha Kissen Sonthalia and the firm of Sukdeodas Ramprosad were personally liable.

4. The second question is this: that towards the end of May 1926 it is alleged that an arrangement was made between the Japan Trading Company, Limited, and Messrs. Sukdeodas Ramprosad either on their own behalf or both on their own behalf and on behalf of the Jajodia Cotton Mills, Limited, whereby Messrs. Sukdeodas Ramprosad were to give two cheques amounting in all to Rs. 40,000 upon the term that the petitioning creditors would abandon their rights on this

promissory note against the Jajodia. Cotton Mills, Limited.

5. Apart from these two points there is another. It is said by the company that in this case the petitioning creditors have not served a statutory notice in compliance with Section 163 of the Indian Companies Act and that in their petition for winding up they make no other case as regards the inability of the company to pay its debts.

6. Now, there can be no doubt that the petition before us is based as regards proof of inability to pay the debts upon two notices which are relied upon under Section 163. Both are from Messrs. Fox and Mandal, the petitioning creditor's solicitors, saying that they were instructed to demand payment to the Japan Cotton Trading Company, Limited, or to us as their solicitors the sum of Rs. 6,00,000 (six lacs) and giving notice that the promissory note had been dishonoured by non payment and that in default the Japan Cotton Trading Company Limited would adopt legal proceedings.

7. Those notices are letters signed by the solicitors in their own name Fox and Mandal, and the objection taken before us is that that does not comply with the of Sub-section (1) to Section 163:If a creditor, to whom the company is indebted in. a sum exceeding Rs. 500 then due, has served on the company a demand under his hand requiring the company to pay the sum so due.

8. We have, therefore, to consider in this case whether it is correct to apply for the purposes of Section 163 the general common law principle qui facit per alium facit per se in accordance with the decision in In re Whitlay Partners, Limited (1886) 32 Ch.D. 337. It seems to me very difficult to say that the words "under his hand" in a section of this character are complied with by any notice in writing or by a notice which is signed by somebody acting in the ordinary way as a solicitor of the petitioning creditors. The effect of the statutory notice is that unless the debt is paid within three weeks, or some arrangement is made with the creditors, the company is in the position of being conclusively estopped from denying that it is unable to pay its debts. It is a highly formal and important document, although it is perfectly true that the demand may be made in any terms. It has to be served on the company by leaving the toe at its registered office and it has to be a demand "under the hand" of the creditors. I think that those words must be taken to have a special intention. The intention must be that there can be no doubt at all about such a notice as this being recognised as a notice directly authorised by the creditors and as one to which will attach or may attach the very serious consequences which the Companies Act imposes. That any solicitor's letter making a demand in any form, if left at the registered office of the company, should be regarded as a notice that the company must be wound up on the creditor's petition if the debt were not paid within three weeks is, I think, not the intention of the statute. I am far from saying that any good would be done by attempting to draw any analogy between this statutory notice and such a notice as the Bankruptcy notice under the English Bankruptcy Act. But it is clear that "under his hand" has some special purpose in this connexion; and in view of the fact that a consequence so serious is attached to non-compliance with the

notice I am not of opinion that there is here nothing to prevent the general common law principle from being applied. That being so the two notices founded upon in this petition as being statutory notices are not sufficient.

9. The only other question which arises is whether the letter written on the 31st of March 1926 signed in the name of the petitioning creditors by their manager Mr. Y. Ohsaka would not be a sufficient compliance. In this case it appears that the promissory note was payable on the 31st of March the very day on which this letter was sent. The letter runs as follows:

Referring to our letter of the 26th March current, we beg to present to you herewith for payment the promissory note for Rs. 6,00,000 dated 21th July 1925 executed by you in favor of Messrs. Sukdeodas Ramprosad and by the latter endorsed over to us for valuable consideration. In default of payment, we shall place the matter in the hands of our solicitors.

10. There might be no great difficulty in allowing these petitioning creditors to rely upon this letter instead of the two letters founded upon in the petition as statutory notice, but, in my opinion, this letter is not such a notice as satisfies the conditions of Section 163. One may take either of two views with regard to the letter. First, it does not appear that the promissory note was one payable on demand; and, therefore, as at present advised, I think that presentment for payment was necessary before it could be said that on the 31st of March the money was due. At the time this letter was written and at the time it was served upon the company presentment had not been completed in order to make the money due. Whether, or not the peon who served this letter was charged with the duty of receiving the money and could, on being told that the money would not be paid, have produced out of his pocket another letter and then served it and so satisfied the section I need not consider; but at the time this letter was served that money could not be said to be due because presentment was being made for the first time by the very letter itself. If, on the other hand, one takes the view that presentment was not necessary at all to charge the makers of this promissory note, then the company was not in default until the end of that day. At the time the letter was served upon them they had still some time in which they could or could not pay the money; and, in my judgment, in no way can that letter ba regarded as a compliance with Section 163. In my view Sub-section (1) to Section 163 means that the company to be served must, at the time of the service, be in default and that, being in default, it is to be served with a demand under rather special precautions so that if it makes further default for a period of three weeks the question of its inability to pay its debts is set at rest. For this reason I think this petition was presented without the petitioning creditors having go their tackle properly in order.

11. It is said that even if the petitioning ?creditors should fail in making out that the company is unable to pay its debts by means of the statutory notice, they should be allowed to prove the company's insolvent position aliunde. In my judgment, that could only be done by amending the petition. But in the present case it is said that the balance sheet produced by the company itself in the course of the proceedings warrants our holding that the company is unable to pay its debts.

Apart from the fact that if the petitioning creditors wanted to show that this company was unable to pay its debts, they ought to have made a definite case so that the company could answer it. I cannot tell for certain, looking at this balance sheet, anything much more than this that this company had some 21 lacs ordinary shares paid up, further 5 lacs preference shares paid up, that it borrowed large sums in addition to that from time to time and has apparently 103 something like Rs. 2,72,000. That is an account of the position of the company. Whether it is impossible for this company by creating a mortgage over its freehold property or over its plant and machinery to raise money is another matter. These are questions at which I can only guess. I do not want to pretend for a moment that this balance sheet would inspire me with any confidence in the concern, but it is not right that this balance sheet produced by the respondents should be taken as against them as proof on the face of it that they are unable to pay their debts.

12. We find that there are two matters on which Mr. Justice Ghose made a decision. He held that the promissory note in this case is not a note of the company. I do not propose to give any opinion on that point, nor would it be fair to do so in view of the fact that the company's case has not been argued before us. The same observation applies to the question whether there was any arrangement releasing the company from the claim of the petitioning creditors. But the effect of our judgment is that these two matters are no longer matters covered by decision and the parties will not any further be deemed to be bound by Mr. Justice Ghose's finding.

13. There is a further matter, viz., the state of the account between Messrs. Sukdeodas Ramprosad and the petitioning creditors. I doubt if that has any bearing on the matter and in any case I say nothing about it.

14. But there is yet one matter upon which I do desire to say something. When this petition was presented, the company without waiting for it to come on for hearing, applied to Mr. Justice Ghose for an order to have the petition taken off the file and the advertisements stayed, and so forth. The company took no advantage by that procedure because the hearing was adjourned to the same day as the hearing of the petition, but I find that the learned Judge has given against the petitioning creditors the costs of the company in making that application. We have gone through the points in this case and it is only necessary for me to say that there was no case at all for taking the petition off the file or anything of that sort. It was a case which was bound to be dealt with in the presence of the creditors and shareholders and after advertisements. I think the order of the learned Judge directing the petitioning creditors to pay those costs to the company was unfounded and I am prepared to interfere with that order as to costs and to discharge it. The result is that this petition is disposed of by this Court on the basis that the petitioning creditors have not satisfied the Court by proper proof that the case comes within Section 182, Clause (5), that the company is unable to pay its debts. The questions as to the liability of the company and as to the arrangement are left open.

15. The order of the learned Judge is varied by discharging that part of it which directed the

petitioning creditors to pay to the company costs of the intermediate application, but the petition is otherwise dismissed with costs and the appeal is dismissed with costs. As to the intermediate application Mr. Banerjee's clients will get the costs of one affidavit only on the ground that it was used as part of their opposition to the petitioning creditors petition but will get no costs of launching the application or of the hearing of the same.

Mukerji, J.

16. I agree.